IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

MONDAY, THE 18TH DECEMBER 2006 / 27TH AGRAHAYANA 1928

El.Pet..No. 4 of 2006()

PETITIONER:

ADV. S.SUNDARESAN, AGED 55 YEARS,
S/O. SIVADASAN, SUSMITHA, VETTIMANKONAM,
THOTTAKKAD P.O., KALLAMBALAM, TRIVANDRUM.

BY ADV. SRI.THOMAS ABRAHAM
SRI.K.B.ARUNKUMAR
SRI.DIPU.R
SMT.MERCIAMMA MATHEW
SMT.JANCY MATHEW

RESPONDENTS:

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1. VARKALA KAHAR,
PUTHENVEEDU, NADAYARA, VARKALA P.O.

2. KUMAR R.,
RODUVILA VEEDU, SREENIVASAPURAM.

3. CHERUNNIYOOR SIVAPRASAD,
MELOOT VEEDU, AYANTHI, VARKALA P.O.

4. K.R.ARAVINDAKSHAN PILLAI,
PRAKASH BHAVANAM, KAKKAKUNNU P.O.,
SOORANAD SOUTH.

5. K.OMANA,
CHAVARUVILA VEEDU, KALLAMBALAM P.O.

6. KAHAR,
RAHILA MANZIL, KSHETHRAM VILA VEEDU,
PALAYAMKUNNU, VARKALA.

7. ADV. SREEVALSAM GOPALAKRISHNAN,
SREEVALSAM, BHARATHANNUR, NEDUMANGAD.

8. MURALIKUMAR,
PRITHVI, POIKAMUKKU, AVANAVANCHERRI, ATTINGAL.

9. VIVEKANANDAN,
NJARAKUZHI VEEDU, JANARDHANAPURAM,
VARKALA P.O.

10. SASIDHARAN,
KATTUVILA, MUNDAYIL, VARKALA.

BY ADV. SRI.K.JAGADEESCHANDRAN NAIR
SRI.J.KRISHNAKUMAR
SRI.P.PARAMESWARAN NAIR
SRI.SAJIKUMAR.K.K.
SMT.DIVYA C BALAN
SRI.SUNIL KUMAR A.G
SRI.SAJU.S.A
SRI.R.SREEKUMAR (PUNNORKODE)

THIS ELECTION PETITION HAVING BEEN FINALLY HEARD ON 26/10/2006, THE COURT ON 18/12/2006 DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN, J.

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E.P.No. 4 of 2006

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Dated this the 18th day of December, 2006.

O R D E R

Petitioner, a candidate, challenges the election of the respondent to the Kerala Legislative Assembly from No. 127 - Varkala assembly constituency, in the 2006 election to the Kerala Legislative Assembly.

2. First respondent, the returned candidate, has filed an affidavit of **preliminary objections** and I.A.No. 5 of 2006 seeking that the pleadings in paragraphs 4 to 12 (virtually, the entire pleadings) be struck out and the election be rejected as one not disclosing any cause of action. I.A.No. 6 of 2006 is filed seeking that I.A.No. 5 of 2006 may be heard and disposed of as a preliminary objection to the maintainability of the election petition.

3. Having regard to the averments in the election petition, it is necessary to advert to the provisions of the Representation of the People Act, 1950, hereinafter, the "1950 Act", for short; the Representation of the

People Act, 1951, hereinafter, the "1951 Act", for short; the Registration of Electors Rules, 1960, hereinafter, the "R E Rules", for short, the Conduct of Election Rules, 1961, hereinafter, the "C E Rules", for short; Order No. 3/ER/2993/JS-II dated 27.03.2003, of the Election Commission of India, hereinafter, the "E C Order", for short and the Model Code of Conduct for the Guidance of Political Parties and Candidates – 2006 issued by the Election Commission of India, hereinafter, the "Code of Conduct", for short.

4. The allegations and the grounds of challenge are set forth in Paragraphs 4 to 12 of the election petition.

5. Paragraph No. 4 contains the general statement of the petitioner that the election of the first respondent is void under the various provisions of the 1951 Act, enumerated therein.

6. Paragraphs 5 and 6 require to be read together. The allegations therein are as follows:

> The 1st respondent who was the sitting MLA of Varkala Constituency had made elaborate arrangements for manipulations in the voters

list much in advance. The names of nearly 10000 voters were deleted from the electoral roll/voters list, which was done through the members of the service organizations owing allegiance to United Democratic Front and Indian National Congress Party. A substantial number of the deleted persons are voters of the Left Democratic Front. A large number of voters included in the lists of deleted persons are genuine voters who still continue to reside in the same address. The massive deletion of voters done at the instance of the 1st respondent and his supporters has substantially affected the petitioner as the margin between the 1st respondent and the petitioner is only 1625 votes. It is only common man's knowledge that as the life expectancy has considerably increased and number of births exceed deaths the number of voters can only increase and cannot decrease. But in Varkala Assembly Constituency the number of electors have decreased. The illegal and improper deletion of a large number of voters is an important aspect that has detrimentally affected the petitioner's election prospects.

6A. It needs no elaboration to notice that the aforesaid pleadings in paragraphs 5 and 6 in the election petition are wholly vague and sweeping, with no specific allegations. Not a single specific case of

deletion or addition of names in the electoral roll is pleaded.

6B. That apart, there is no provision in the 1951 Act that enables the High Court to set aside the election on the ground of any defect in the electoral roll. Part III of the 1950 Act deals with the preparation of rolls in a constituency. The provisions contained therein prescribe the qualifications for being registered as a voter as well as the disqualifications. Sections 21 to 23 of that Act provide for revision of electoral rolls, correction of entries in the electoral rolls and inclusion of names in electoral rolls. Sections 14 to 24 of the 1950 Act are integrated provisions and they form a complete code by themselves in the matter of preparation and maintenance of electoral rolls. The entries in the electoral rolls are final and they are not open to challenge either before a civil court or before a tribunal which considers the validity of any election. Such an embargo in law is noticed and is part of the law laid by the Apex Court in **Kabul Singh v. Kundan Singh [(1969) 2 SCC 452]**. To hold so, Section 30 of the 1950 Act barring the jurisdiction of the civil courts, was also noticed. After noticing the law laid down in **Kabul Singh** *(supra)* and the

provision of Section 30 of the 1950 Act, it was laid down by the Apex Court in **Hari Prasad Mulshanker Trivedi v. V.B.Raju [(1974) 3 SCC 415]** that there is an implied ouster of the jurisdiction of the court trying an election petition to go into the question of validity of an electoral roll. This position was reiterated by the Apex Court in **S.K.Choudhary v. B.Panjiar (AIR 1973 SC 717)** wherein it was held that in a petition to the High Court to set aside an election, it is not open to the High Court to go into the question whether the names of certain persons entered in the electoral roll were entered illegally. The Apex Court further held that even assuming that the inclusion of names of certain persons in the electoral roll was illegal, it was not open to the High Court, when trying an election petition, to go behind the electoral roll and enquire into the question whether those persons were validly included in the electoral roll. Hence, any plea of improper inclusion and exclusion to the electoral roll is no ground to set aside an election.

6C. The right to be included in the electoral roll or to challenge the inclusion of any name in the electoral roll is a right conferred upon an individual and the fact that certain names for inclusion of names

in electoral rolls or objections relating to inclusion of certain names are not finally disposed of, cannot arrest the process of election to the legislature. [See **Lakshmi Charan Sen v. A.K.M.Hassan Uzzaman (AIR 1985 SC 1233**)]. As a necessary corollary, the inclusion or exclusion of persons from the voters list is not justiciable in an election petition under the 1951 Act.

6D. Therefore, the pleadings in paragraphs 5 and 6 of the election petition, apart from being vague, do not disclose any cause of action, to be tried.

7. Paragraph No. 7 of the election petition contains a general statement that the election of the first respondent is liable to be declared void under Section 100(1) (b) of the Act as he and his supporters, with his knowledge, have allegedly committed corrupt practices, the details of which are stated elsewhere in the election petition.

8. The allegations in paragraph No. 8 are as follows:

> The affidavit filed by the 1st respondent along with the nomination does not contain the

true facts. The answers given in various columns of the affidavit format are not true. Several columns have been left blank and incomplete. The callous and indifferent approach shown by the 1st respondent in the furnishing of essential information required in the affidavit which forms an integral part of the nomination form itself, is apparent from the manner in which it has been prepared. When there is an incomplete affidavit the Returning Officer ought to have rejected the same owing to its patent defects. A cursory glance through Annexure 1, the nomination form and the affidavit accompanying the same, is sufficient to see that there is "improper acceptance of nomination" by the Returning Officer which is a ground for declaring the election to be void under Section 100(1)(d)(i) of the Act. The cardinal facts not furnished in the affidavit includes inter alia the following:-

(i) The name of the spouse,
(ii) The name of the dependants,
(iii) Bank Account Number,
(iv) Registration number of the car.

8A. Section 33 of the 1951 Act provides for presentation of nomination paper and requirements of a valid nomination. The nomination paper is to be in the prescribed form. Sub-section (2) of Section 33A

of that Act enjoins that the candidate shall file an affidavit in the prescribed form verifying the information specified in Section 33A(1), along with the nomination paper. This is to give effect to the indendment of Section 33A, recognising the right of the voters, to information. Section 33A(1) enjoins disclosure of information as to whether the candidate is an accused in any case as stated in clause (i) thereof or has been convicted as stated in clause (ii) thereof. Applying Clause (g) of Section 2, the interpretation clause in the 1951 Act, "prescribed" means prescribed by rules made under the Act. Rule 4 of the C E Rules prescribed under the 1951 Act provides that every nomination paper shall be in such one of the Forms 2A to 2E, as may be appropriate. Rule 4A was incorporated in the C E Rules with effect from 3-9-2002 following the introduction of Section 33A in the 1951 Act. The said Rule provides that an affidavit in Form 26 of those Rules shall also be delivered to the Returning Officer along with the nomination paper. Rule 4A of the C E Rules which prescribes the mode of affidavit can also be only for insisting the disclosure of information in terms of Section 33A(1). This is the reason why Form 26 is formulated in the manner in which it is, requiring disclosure of the

particulars referable to matters contained in Clauses (i) and (ii) of Section 33A(1) of the 1951 Act. So much so, an affidavit in Form 26 of the C E Rules is not required to contain any disclosure by the candidate regarding debts or any matter in excess of what is required of him to be disclosed in terms of Section 33A(1).

8B. The election petitioner does not have a case that the first respondent has not furnished the information which he was bound to disclose in terms of Section 33A(1) of the 1951 Act. He has no case that the affidavit furnished by the first respondent in Form 26, before the Returning Officer along with his nomination paper, was incomplete. His case is only that these are omissions/suppressions in the affidavit sworn to by the first respondent in terms of the E C Order dated 27-3-2003.

8C. In **People's Union for Civil Liberties v. Union of India [(2003) 4 SCC 399]**, Section 33B of the Act, inserted by Act 72/2002, was held as unconstitutional. Dilating on the question of disclosure of assets and liabilities, it was held that Direction No.4 of Paragraph No. 14 of the EC Order

dated 28th June, 2002, in so far as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing of wrong information or suppressing material information, should not be enforced. It was accordingly that the revised E C Order dated 27-3-2003 was issued by the Election Commission clarifying that its earlier direction, in so far as it provided for verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing of wrong information or suppressing material information, is not enforceable as per the decision of the Apex Court in **PUCL** *(supra)*. Even going by the E C Order, any non-disclosure by the first respondent, of the name of his wife, the name of his dependants, bank account number, registration number of the car and such other details, in the affidavit enjoined by the E C Order would be no ground to reject the first respondent's nomination.

8D. It is further urged on behalf of the election petitioner that the non-compliance of the directions of the Election Commission in the E C Order is to be treated as a situation where the election becomes liable to be set aside on the ground of non-compliance

with the provisions of the Constitution, falling within Section 100(1)(d)(iv) of the 1951 Act. While Article 324 is a provision of the Constitution of India, the orders issued by the Election Commission under that provision cannot be treated as provisions of the Constitution. Therefore, any non-compliance of the E C Order cannot be treated as non-compliance with the provisions of the Constitution, to set aside an election under Sub-section (1)(d)(iv) of Section 100 of the 1951 Act.

8E. So much so, any defect in the affidavit enjoined in the E C Order is no ground to set aside an election on the ground of improper acceptance of nomination.

8F. The pleadings in paragraph 8 of the election petition do not, therefore, disclose any cause of action, to be tried.

9. In Paragraph No. 9 of the election petition, it is alleged that the first respondent's election is liable to be declared void under section 100 (1) (d) (iv) on the ground that he has not complied with the provisions of the Constitution, the 1951 Act, the

rules and orders issued under that Act, including the Code of Conduct. The accusations are three in number, pleaded in sub – paragraphs (i), (ii) & (iii) of paragraph No.9. Since they require to be dealt with separately, I do so in the paragraphs that would succeed the immediate two.

9A. Sub-paragraphs 1, 2 and 3 of paragraph no.9 of the election petition contain different allegations to the effect that there are violations of the Code of Conduct. There is no provision in the 1951 Act amounting to a ground for declaring the election to be void on account of the non-compliance of the Code of Conduct. The Code of Conduct is not a provision of the Constitution. Nor is it a provision of 1951 Act. It is also not a rule or order made under the 1951 Act. Section 123 of the 1951 Act does not include the mere violation or non-compliance of the Code of Conduct, among corrupt practices. So much so, the mere allegation that there is a violation of the Code of Conduct would not be a ground to declare an election to be void. If the violation of any of the prescriptions of the Code of Conduct amounts to any of the grounds provided in the 1951 Act for having an election declared as void, then, and only then, would

such violation of the Code of Conduct become relevant in an election petition under the 1951 Act. Section 80 of the 1951 Act provides that no election shall be called in question except by an election petition presented in accordance with the provisions of Part VI of the 1951 Act. So much so, an alleged violation of a prescription in the Code of Conduct or lack of adherence to any such prescription can be considered in an election only if the ground or violation urged is also one which is enumerated in the 1951 Act as a ground to declare the election to be void. No ground to set aside an election would be made out, even on proof of any violation of the Code of Conduct, not amounting to a ground under Section 100 of the 1951 Act.

9B. It is apposite in this context to notice that, dilating on the provisions of the 1950 and 1951 Acts, the Apex Court laid down in **Lakshmi Charan Sen v. A.K.M.Hassan Uzzaman (AIR 1985 SC 1233)** as follows:

> ".....There is no provision in either of these Acts which would justify the proposition that the directions given by the Election Commission have the force of law. Election Laws are self-contained Codes. One must look

to them for identifying the rights and obligations of the parties, whether they are private citizens or public officials. Therefore, in the absence of a provision to that effect, it would not be correct to equate with law, the directions given by the Election Commission to the Chief Electoral Officers. The Election Commission is, of course, entitled to act ex debito justitiae, in the sense that, it can take steps or direct that steps be taken over and above those which it is under an obligation to take under the law. It is, therefore, entitled to issue directions to the Chief Electoral Officers. Such directions are binding upon the latter but, their violation cannot create rights and obligations unknown to the Election Law."

10. The allegations in Paragraph No. 9(i) of the election petition are as follows:

"(i). With the knowledge and consent of the 1st respondent, the Kerala Kaumudi Daily published two full pages report with color photos on 20.03.2006. There is blatant violation of the Code of Conduct as the same contains promises regarding construction of roads etc. Extending promises in connection with an election is strictly prohibited as per the stipulations in Clause A of para vii sub para vi of Model Code of Conduct. This

publication in Kerala Kaumudi is in blatant violation of the said directive as well as other statutory stipulations. Regarding this publication in Kerala Kaumudi there are other irregularities also. The 1st respondent at any rate cannot disown the said publication as the same was published for furthering his prospects in the election. Therefore the said publication for all legal purposes has to be treated as a publication done in connection with his election campaign. But there is clear violation of the legal requirements relating to the publications in connection with election in the case of this special publications in Kerala Kaumudi. The publication is termed as 'Impact Feature'. Whether it is an advertisement published on payment made by the candidate/agent or a feature published by Kerala Kaumudi requires to be clarified. The total number of copies printed is not stated in the published manner. The name of the person at whose instance the publication was printed, published and circulated is also not stated in the publication. Petitioner immediately addressed the Chief Election Commissioner, New Delhi, Chief Electoral Officer, Kerala and the District Collector, Trivandrum, regarding the violation of law involved in this publication. The true copies of the said petitions dated 20.03.2006 submitted to the Chief Election Commissioner, New Delhi, Chief Electoral Officer Kerala and the District Collector, Trivandrum are produced herewith and marked as

Annexure 2 collectively. Petitioner reliably understands that nearly one lakh copies have been circulated among the voters in Varkala Legislative Assembly Constituency. The cost of the said publication would normally be around 2 to 2.5 lakhs. The photographs have been printed in multi color. The multi color advertisement cannot normally be published by any newspaper without collecting the advertisement fee. But the actual expense involved has not been truly stated by the 1st respondent. This is a serious violation of the mandates of Section 77 of the Act. This is a corrupt practice under 123(6)."

10A. Barring the allegation that there is violation of Clause VII(vi)(a) of the Code of Conduct, the only allegation made with reference to the 1951 Act is that the actual expenses for printing the publication in Kerala Kaumudi are not truly stated by the first respondent and therefore, there is violation of the mandate of Section 77 of the Act and hence, it amounts to a corrupt practice in terms of Section 123 (6) of the 1951 Act. Section 123(6) provides that the incurring or authorizing of expenditure in contravention of Section 77 shall be deemed to be a corrupt practice for the purpose of the 1951 Act. Section 77(3) provides that the total of the said expenditure shall not exceed such amount as may be

prescribed. It is only the incurring or authorising of expenditure in excess of the prescribed limit that would lead to the commission of a corrupt practice in terms of Section 123(6) of the 1951 Act. The mere allegations that the actual expenses have not been truly stated by the first respondent, which alone is the plea of the petitioner on the basis of Section 77, would not amount to the corrupt practice under Section 123(6). (See **Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe (AIR 1995 SC 2284)**. There is no plea that the first respondent has exceeded the expenditure prescribed as the limit in terms of Section 77(3) of the 1951 Act. Therefore, no ground for trial of an alleged corrupt practice under Section 123(6) is made out.

10B. There is no allegation in paragraph 9(i) of the election petition as to what is the provision in Section 77 of the 1951 Act that has been violated. That apart, a reading of paragraph 9(i) of the election petition as a whole would abundantly make it clear that it does not contain any specific pleading of the first respondent having expended funds for the publication pleaded therein. All that the election petitioner wants the Court, is to treat that

publication as one done in connection with the election campaign for the first respondent because, according to the election petitioner, "the first respondent, at any rate, cannot disown the publication as the same was published for furthering his prospects in the election.". The election petitioner pleads that the publication referred to by him is termed as an "impact feature" but he does not even assert that it is an advertisement or a publication by the first respondent. All that he has pleaded is "whether it is an advertisement published on payment made by the candidate/agent or a feature published by Kerala Kaumudi requires to be clarified" and "the multi color advertisement cannot normally be published by any newspaper without collecting the advertisement fee". The nexus between the Kerala Kaumudi daily and the petitioner is also not pleaded.

10C. To cap all these, is the non-disclosure of the contents of the said publication. All that is stated is that it contains certain promises in connection with the election. The so-called publication is not produced, even to show as to what is the alleged violation of the Code of Conduct. The pleadings in paragraph 9(i) of the election petition

are too vague to compel the first respondent to stand trial for an election offence, which is essentially quasi criminal in nature.

10D. Even a reference to Clause VII(vi) of the Code of Conduct would show that all that it requires is that from the time elections are announced by the Commission, Ministers and other authorities shall not announce any financial grants in any form or promises thereof or make any promise of construction of roads, provision of drinking water facilities etc. which may have the effect of influencing the voters in favour of the party in power. There is no specific allegation in par 9(i) as to what is the announcement made. The only statement that I could find is that "there is blatant violation of the Code of Conduct as the same contains promises regarding construction of roads etc."

10E. Hence, there is no triable cause of action in the pleadings in paragraph no. 9(i) of the election petition.

11. The allegations in paragraph No. 9 (ii) of the election petition are as follows:

> "(ii). The 1st respondent after the announcement of election by the Election Commission i.e., after the Model Code of Conduct came into force, had put up large size hoardings/sign boards with the matter **"CONSTRUCTED BY USING THE FUND OF VARKALA KAHAR MLA"** in all the bus waiting sheds in almost the entire constituency and particularly in the waiting sheds in Kallambalam-Papanasham Road. Petitioner had submitted written complaints regarding this violation also."

11A. There is not even a plea that the conduct attributed to the first respondent in paragraph 9(ii) of the election petition is a corrupt practice. The putting up of large size hoardings is not a ground to set aside an election. Apart from saying that hoardings were put up after the announcement of the election and after coming into force of the Code of Conduct, there is not even a plea in paragraph 9(ii) as to what is the allegation on the basis of the law contained in the 1951 Act. Therefore, paragraph 9(ii) also does not disclose any cause of action to be tried.

12. The case pleaded in paragraph No. 9 (iii) of the election petition is as follows:

> "(iii). With the deliberate malafide motive to win over the voters, the 1st respondent issued TV sets to 2 Art Clubs/Voluntary Organizations through the BDO Varkala. The money was allotted from the 1st respondent's MLA fund. Code of Conduct came into force with effect from 1st March 2006. The payment was effected on 14.03.2006. The date of the order is shown as 28.02.2006. The date is deliberately put as 28.02.2006 to escape from the mandates of the Code of Conduct. But the circumstances show that the 1st respondent sanctioned grant and made payments out of MLA's Fund to the tune of Rs.21080 to the two arts clubs in Varkala Constituency in order to influence voters. A true copies of the relevant papers relating to the purchase and issuance of the same to the two arts clubs viz., Desabandhu Arts & Sports Club Varkala and Aryabatta Arts & Sports Club Elakaman are produced herewith and marked as **Annexure 4 collectively**. Apart from the violation of the Model Code of Conduct, the 1st respondent is guilty of having committed the corrupt practice of bribery under Section 123(1)(A) also through the above act."

12A. In addition to what is stated earlier, regarding the legal effect of the Code of Conduct, it requires to be decided as to whether there is a prima facie case of corrupt practice of bribery under Section 126(1)(A) of the 1951 Act as pleaded. Even going by the pleadings of the petitioner in paragraph 9(iii) of the election petition, the amount was sanctioned by the District Collector on 28-2-2006, that is before the date of notification of the election on 1-3-2006. Barring the statement that "apart from the violation of the Code of Conduct, the 1st respondent is guilty of having committed the corrupt practice of bribery under Section 123(1)(A) also through the above act", there is no plea of any fact which would constitute any of the essential ingredients to constitute bribery under Section 123(1)(A) of the 1951 Act. The provision for TV sets for Arts Clubs from out of MLA's fund cannot be treated as any gift by the candidate, though he was the MLA from whose fund such amount was released. This is because, to constitute bribery, such gift must be of some gratification. The payment out of MLA's fund cannot be treated as a payment of a gratification. The concept of gratification in the definition of "bribery" in the 1951 Act takes its colour, in the context, to mean a recompense, tip or bribe and it is only the gift of such

a gratification that would amount to bribery. In connection with the situation in hand, the release of amounts for the purchase of 2 TV sets in favour of two Arts Clubs cannot be treated as the commission of the corrupt practice of bribery particularly when there is not even a plea that it was intended to gift to any particular voter or voters. I do not, therefore, find any specific plea of a case of bribery in paragraph 9 (iii) of the election petition. The pleadings therein do not constitute a cause of action to be put to trial.

13. The averments in Paragraph 10 of the Election Petition are made in the following terms:

> "Petitioner is calling in question the election of the 1st respondent on the grounds of wide and extensive corrupt practices perpetrated by the 1st respondent his election agent and his other agents and the organizers and workers of his election campaign, who were also acting as his agents with the direction, consent and connivance of the returned candidate and his election agent. They published appeals to canvas votes on communal and religious basis. Sivagiri Mutt is situated in Varkala Constituency. Persons belonging to Ezhava Community and having faith in the philosophy and teachings of Sreenarayana Guru

were attempted to be influenced by giving an advertisement in Kerala Kaumudi daily on the election date i.e., 22.04.2006. The said advertisement was in the name of one Sri.P.K.Vidyadharan, President of Sivagiri S.N.D.P.Union. A similar statement in the name of Sri.P.K.Vidyadharan with his photograph was published on 21.04.2006 in Veekshanam daily which is a daily under the control of Indian National Congress Party. The said statement quoted an article written by Sivagiri SNDP Union President, Sri.P.K.Vidyadharan in a periodical named Kala Keralam. The true copy of the said report which appeared in Veekshanam daily dated 21.04.2006 is produced herewith and marked as **Annexure 5**. The true English translation of Annexure 5 is produced herewith and marked as **Annexure 5(a)**. The true copy of the advertisement which was published in Kerala Kaumudi on 22.04.2006 referred supra is produced herewith and marked as **Annexure 6**. A true English translation of Annexure 6 is produced herewith and marked as **Annexure 6(a)**. The relevant issue of Kala Keralam periodical referred to in Annexure 5 is published with a cover page bearing a large size photograph of the 1st respondent. The central sheets (4 pages) also exclusively contain an election campaign material of the 1st respondent. The colour photos of the 1st respondent and the aforesaid P.K.Vidyadharan is in the 1st page of the central sheet. In the 3rd page a photograph showing the 1st respondent sharing a stage with

3 swamis of Sivagiri Mutt viz., Subhangananda Swami, Sampoornanandha Swami, Swaroopanandha Swami and some other Sreenarayana Movement leaders is published in the 4th page. Towards the end of the page the statement of P.K.Vidhyadharan declaring that SNDP Union is with Varkala Kahar in the election is printed. Though the month of the publication is shown as January 2006, this Kala Keralam periodical was circulated/distributed throughout the constituency only during the 2nd week of April 2006. The contents of the interview of the 1st respondent published in the said weekly reveals that the printing and publication of the same was only just prior to the election. It is clear that the 1st respondent wanted to create the impression that this multi coloured election campaign material was printed and circulated by the management of Kala Keralam and not by himself or his agents or other supporters. He was trying to evade from the inclusion of the expenses of printing the said material and circulating the same, in his election expenses. This is a major corrupt practice under Section 123(6). Moreover, the contents of the statement published in Kala Keralam in the name of Sri.P.K.Vidhyadharan is almost identical to Annexures 5 and 6. 2 days after the election on 24.04.2006 another advertisement in the name of P.K.Vidhyadharan appeared in Kerala Kaumudi daily denying Annexure 6 advertisement. The true copy of the said advertisement which was published in

Kerala Kaumudi dated 24.04.2006 is produced herewith and marked as **Annexure 7**. The true copy of the English translation is produced herewith and marked as **Annexure 7(a)**. On 08.05.2006 another announcement in the name of P.K.Vidhyadharan reiterating the contents of Annexure 8 was published in Kerala Kaumudi daily. This time a note by the Managing Editor stating that the publication of Annexure 6 was due to a mistake committed by the Marketing Division of the Daily was also published. The true copy of the said announcement is produced herewith and marked as **Annexure 8**. The true English translation of Annexure 8 is produced herewith and marked as **Annexure 8(a)**. The glaring attempt of the 1st respondent his agents and supporters with the connivance of the management of Kerala Kaumudi daily was to influence the voters in Varkala Constituency who are Sreenarayanites, in faith and or belonging to Ezhava Community. Their attempts have considerably influenced the voters belonging to the above sections, affecting the petitioner detrimentally. 1st respondent has than committed the corrupt practice u/s 123(3) of the Representation of People Act 1951. There are a considerable number of voters who are members of Islamic Religion. In order to promote feelings of enmity and hatred on the basis of religion for the furtherance of the prospectus of the election of the 1st respondent with the knowledge of the 1st respondent, his agents and workers a false statement was

published in the Veekshanam, the Congress daily on 21.04.2006. The true copy of the said report is produced herewith and marked as **Annexure 9**. The true copy of the English translation of Annexure 9 is produced herewith and marked as **Annexure 9(a)**. It is falsely stated in Annexure 9 that petitioner compared the hair grown by Pannian Raveendran M.P. to that of Prophet Muhammed Nabi. Annexure 9 report is on the basis of a statement alleged to have been issued by Muhammed Sarakh, Secretary Edava Panchayath Committees of Muslim League. It is further stated in the report that unless the petitioner withdraws his statement and tenders apology, the Muslim Community would respond to Sundaresan through ballot. This was published with the knowledge and consent of the 1st respondent, his agents, supporters and workers. This is clearly commission of a corrupt practice u/s 123 (3-A). Lawyers notices were issued to the Editor and Publisher of Kerala Kaumudi and Sri.P.K.Vidhyadharan regarding the publication of Annexure 7 and to the Editor and Publisher of Veekshanam daily and Mr.Muhammed Sirakh in the case of the publication of Annexure 9."

13A. On deciphering the averments in paragraph 10 of the election petition, it appears that two different sets of allegations are made therein. I shall deal with them, separately, hereunder:

13B. The first one is that Annexure-5 publication carried an exhortion by Sri.P.K.Vidyadharan, the President of the Sivagiri S.N.D.P.Union that S.N.D.P.Union is with the first respondent in the election. That document (Annexure-5) also contains an interview of the first respondent.

13C. Based on the aforesaid publication, the first charge attempted to be made out is that the expenditure for the publication shown to be as "Kala Keralam" periodical is not accounted for by the first respondent and therefore, there is contravention of Section 77 of the 1951 Act and hence, it amounts to a corrupt practice under Section 123(6) of that Act. Barring the statements that "it is clear that the 1st respondent wanted to create the impression that this multi coloured election campaign material was printed and circulated by the management of Kala Keralam and not by himself or his agents or other supports" and that "he was trying to evade from the inclusion of the expenses of printing the said material and circulating the same, in his election expenses", there is no pleading, worth the name, that the first respondent incurred or authorised expenditure in excess of the limit prescribed by Section 77(3) of the 1951 Act. There is, therefore, no plea of an

allegation of a corrupt practice under Section 123(6) of the 1951 Act, to be put to trial.

13D. Based on the alleged statement of Sri.P.K.Vidyadharan and the subsequent denial by the said Vidyadharan of that statement, the first respondent is alleged to have attempted to influence the voters in the constituency on the basis of their faith and community. It is the allegation of the election petitioner that the voters in the Varkala constituency are predominantly Sreenarayanites, in faith, belonging to Ezhava community. Leaving apart the questions whether S.N.D.P.Union is a community by itself or whether there is any religion, class, category or creed by name Sreenarayanites in the name of the Great Sree Narayana Guru who preached "one caste, one religion and one God for man", the pleadings as regards the above allegations are grossly inadequate and do not disclose a corrupt practice under Section 123(3) of the 1951 Act, which reads as follows:

> "**123. Corrupt practices**.-The following shall be deemed to be corrupt practices for the purposes of this Act-

> (3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate."

13E. The above provision falls into two parts. The use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem would be a corrupt practice unless it is a symbol allotted to the candidate, under the Act. The petitioner has no case that the first respondent has committed such a corrupt practice. The appeal to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language is also a corrupt practice. Here, the word "his" assumes significance and has been held to be so by the Apex Court in **Dr.Ramesh Yeshwant Prabhoo v. Prabhakar K. Kunte [(1996) 1 SCC 130]** and **Harmohinder Singh Talwandi [(2005) 5 SCC 46]**. For soliciting votes

for a candidate, the appeal prohibited is that which is made on the ground of religion of the candidate for whom the votes are sought and when the appeal is to refrain from voting for any candidate, the prohibition is against an appeal on the ground of the religion of that other candidate. The first is a positive appeal and the second a negative appeal. So much so, to be a corrupt practice under Section 123(3) of the 1951 Act, the appeal to vote or not to vote must depend upon the religion, race, caste, community or language of the candidate for whom the votes are sought or the religion, race, caste, community or language of the person against whose interest the appeal is made. The plea of the election petitioner is not any of these two. His plea is that there was an appeal to Sreenarayanites and the members of the Ezhava community to vote for a particular candidate. It is that exhortion, if at all, which is alleged as a corrupt practice. Evidently, that is not what is provided for in Section 123(3) of the 1951 Act. This will be abundantly clear from the plea of the election petitioner that "their attempts have considerably influenced by(sic) the voters belonging to the above sections, affecting the petitioner detrimentally."

13F. So much so, no triable ground is made out on the basis of the alleged exhortion by Sri.P.K.Vidyadharan and his reported denial of such exhortion.

14. The next plea is that there are considerable voters in the constituency belonging to the Islamic religion and that in order to promote feelings of enmity and hatred on the basis of religion, for the furtherance of the prospects of the election of the first respondent, a news item was published reporting that the election petitioner made a public speech comparing the hair grown by Pannian Raveendran, M.P. to that of Prophet Muhammed Nabi and that Muhammed Sarakh, the Secretary of the Edava Panchayat Committee of Muslim Leaque came out with a statement, calling upon the election petitioner to withdraw the said statement and apologise for the same, lest which, the Muslim community would respond to him through the ballot.

14A. Applying the principle noticed above in relation to Section 123(3), it can be seen that there was no oowing of voters to vote for the first respondent on any objectionable ground on that count. Nor was

there any plea to deter from voting for the petitioner on the ground of his religion.

14B. However, the petitioner pleads that this would amount to a corrupt practice under sub-section (3A) of Section 123 which reads as follows:

> "**123. Corrupt practices**.-The following shall be deemed to be corrupt practices for the purposes of this Act:-
>
> (3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other persons with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate."

14C. The pleading in paragraph 10 of the election petition relating to the allegation of publishing a false statement regarding the comparison made by the petitioner between the hair grown by Pannian Raveendran, M.P. and Prophet Muhammed Nabi, is not followed by any further plea that any alleged promotion of feelings of

enmity between the different classes was for the furtherance of the prospects of election of the first respondent or for prejudicially affecting the election of the petitioner or any other candidate. Therefore, there is total lack of pleading regarding an essential ingredient of the ground of corrupt practice under Section 123(3A) and what is lacking is a material fact, without which the alleged corrupt practice is not disclosed in the pleadings. Hence, the election petition does not deserve to be tried on this count.

14D. That apart, the allegation is only that, in Annexure-9, the petitioner is reported to have compared the hair grown by Pannian Raveendran to that of Prophet Muhammed Nabi and that on the basis of such statement of the petitioner, the Secretary of the Edava Panchayat Committee of Muslim League called upon the petitioner to withdraw such statement or tender apology, lest which, the Muslim community would respond to the petitioner through the ballot. Even if such pleading is treated as prima facie true to consider whether it discloses a triable cause of action, it does not amount to an allegation as to promotion or, or attempt to promote, feelings of enmity or hatred between different classes of citizens on grounds of religion, race, caste,

community or the language. The alleged exhortion of Muhammed Sarakh is, obviously, only to the petitioner to tender apology, lest which, the Muslim community would respond to him through the ballot. This does not amount to creating a feeling of enmity or hatred between different classes, though it may indicate an exhortion to the Muslim community to vote against the petitioner.

14E. Not only that, there is no pleading that even if the aforesaid publication is false, it has been published by the one who is accused of the said publication as having done it believing it to be false or without believing it to be true.

14F. As already noticed, that exhortation against the petitioner is not on the ground of his religion to bring it under Sub-section (3).

14G. The pleadings in paragraph no. 10 relating to Annexure 9, does not, therefore, make out a case for trial of this election petition on the ground of corrupt practice under Section 123(3A) of the 1951 Act.

15. Making reference to the above averments in paragraph 10 of the election petition, it is contended

in paragraph 11 thereof that by making the false statements, against the petitioner, in Annexure 9 and making false statements to influence Ezhava Community and Sreenarayanites, the 1st respondent, his agent and his other agents and workers have committed the corrupt practice under Section 123(4) also as the said publications were with the consent of the candidate or his agent, of statement of facts which are false and which he believes to be false or does not believe to be true in relation to the personal character and conduct of the petitioner being a statement reasonably calculated to prejudice the prospects of the petitioner's election.

15A. The allegations in paragraphs 10 and 11 do not constitute the publication of any statement in relation to the personal character or conduct of the petitioner. That apart, the averments in paragraph 11 of the election petition are wholly vague to proceed with trial of an election petition on ground of corrupt practice under Section 123(4) of the 1951 Act. The election petition, therefore, does not disclose any cause of action to be tried on the ground of corrupt practice under Section 123(4) of the 1951 Act.

16. In paragraph 12, it is contended as follows:

> "1st respondent was incurring and authorizing expenditure in contravention of Section 77 of the RP Act 1951 and Rules 86 and 90 of Conduct of Election Rules as contemplated under section 123(6) of the RP Act, 1951. The 1st respondent has spent a very huge amount much in excess of the allowed limit as stated supra. The 1st respondent, his election agent and other agents have printed and published several election materials which do not bear on their face, the names and addresses of the printer and publisher and thereby committed the electoral offences under section 127(A) of the Representation of the People Act, 1951 also. By publication of Annexure 9, the 1st respondent, his agent and other agents and workers have committed the election offences under section 125 of the Representation of the People Act, 1951 also. Apart from the above, it may kindly be seen that 1st respondent has availed the Direct Post System of the Postal Department for his election. He sent 25,000 appeals even without writing any address on the envelope making postmen to give his appeal in various parts of the constituency. Postal Authority levied only the concession rate of Rs.1.50 per envelope. When a candidate uses this facility he is taking undue advantage of the Government postal system. This is also a violation of the Conduct Rules and the

provisions of the Representation of the People Act. Rs.45,000/- was remitted by the 1st respondent on 30.03.2006. A LDF worker namely S.Biju, Kochuvila Veedu, Njakkadu, Vadassery submitted a written complaint to the authorities. The 1st respondent much after the announcement of the election started sending letters in his letter heads to persons selected under various welfare scheme for financial assistance etc. in order to give the impression that they are getting the assistance at the instance of the 1st respondent. The true copy of one such a latter dated 22.02.2006 and the copy of the envelope of the same are produced herewith and marked as **Annexure 10**. The true copy of the English Translation of Annexure 10 is produced herewith and marked as **Annexure 10 (a)**."

16A. The corrupt practice under Section 123(6) relates to the incurring or authorizing expenditure in contravention of Section 77 which, in turn, applies only to the candidate. He is required to keep separate and correct account of expenditures incurred between the date on which he has been nominated and the date of declaration of the result, both days inclusive. The petitioner has not even pleaded the date of nomination of the first respondent. I am, therefore, compelled to look into the preliminary objections of the first

respondent to ascertain that date. It is pleaded to be 3-4-2006. With that uncontroverted statement, it can be seen that the expenditures referred to in paragraph 12 of the election petition are referable predominantly to dates before the first respondent filed the nomination. Even if the publication of the impact feature in Kerala Kaumudi on 20-3-2006 is to be treated as an advertisement, that was well before the date on which the first respondent was nominated. With the scant and vague pleadings in paragraph 12 of the election petition, I do not find any cause of action to try the election petition on account of any allegation of corrupt practice under Section 123(6) of the 1951 Act.

17. In the result, it is held that this election petition does not disclose a cause of action, to be proceeded with and tried. It is accordingly rejected.

The substance of this decision shall be communicated to the Election Commission and to the Speaker of the Kerala Legislative Assembly as required by Section 103 of the 1951 Act. An authentic copy of this order shall also be sent to the Election Commission as prescribed.

SD/-

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

Sha/